

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF SCHMIDT,

3003 Van Ness Street, NW #W406
Washington, DC 20008

Plaintiff,

v.

AMERICAN INSTITUTE OF PHYSICS,

One Physics Ellipse
College Park, Md. 20740
Prince George's County

Defendants.

Case No. 04-cv-3774

Judge: Alexander Williams

PLAINTIFF'S FIRST AMENDED AND CONSOLIDATED COMPLAINT

Plaintiff, by and through the undersigned attorneys, alleges as follows:

I. NATURE OF ACTION

1. Plaintiff Dr. Jeff Schmidt ("Dr. Schmidt") is a white citizen of the United States and former employee of defendant American Institute of Physics ("AIP"). He brings this action for breach of contract, detrimental reliance, breach of implied covenant of good faith and fair dealing, and violation of 42 U.S.C. §§ 1981 and 1983 to seek redress for AIP's retaliatory actions, including the silencing and ultimate firing of plaintiff due to his participation in statutorily protected activity, namely attempting to stop AIP's discriminatory hiring practices. On the basis of these violations, Dr. Schmidt seeks reinstatement, back pay, front pay, compensatory damages, and punitive damages.

2. Plaintiff Dr. Schmidt also brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII") to seek redress for AIP's unlawful discriminatory employment practices committed by AIP in retaliation for plaintiff's participation in

statutorily protected activity, namely attempting to stop AIP's discriminatory hiring practices. On the basis of these violations, Dr. Schmidt seeks reinstatement, back pay, front pay, compensatory damages, and punitive damages.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over plaintiff's claims under 42 U.S.C. §§ 1981 and 1983 pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4) (1993). This Court has jurisdiction over plaintiff's claims under Title VII pursuant to 42 U.S.C. §§ 2000e – 5(f) through (k) and 16(c).

4. Plaintiff has fully and completely exhausted all administrative remedies required as a condition precedent to this lawsuit. On July 20, 2004, Dr. Schmidt received a Notice of Suit Rights from the U.S. Equal Employment Opportunity Commission's acting director Marie M. Tomasso, attached hereto as Exhibit A.

5. This case was originally filed in the United States District Court for the District of Columbia. On June 28, 2004, that court transferred the common law and 42 U.S.C. § 1983 claims to the United States District Court for the District of Maryland. The parties consented to the transfer of the 42 U.S.C. § 1981 claim.

III. PARTIES

6. Plaintiff Jeff Schmidt is a white citizen of the United States and a resident of the District of Columbia. Dr. Schmidt commenced employment with AIP at its New York, New York location in March 1981. Dr. Schmidt worked at AIP's *Physics Today* magazine as an Associate Editor, then as a Senior Associate Editor. Dr. Schmidt moved to Washington, D.C. in October 1993. He worked at AIP's main office in College Park, Maryland and in Washington, D.C. from October 1993 until he was summarily dismissed on May 31, 2000.

7. Defendant AIP is a not-for-profit membership corporation that is incorporated in the State of New York and has its principal place of business in College Park, Maryland. AIP has appointed a

registered agent in Maryland for the service of process. AIP publishes, edits, sells and distributes scientific journals, including the magazine *Physics Today*. AIP sells and distributes its publications throughout the United States and internationally.

IV. AIP MANAGEMENT

8. Marc H. Brodsky is AIP's Executive Director and CEO. Mr. Brodsky is the direct supervisor of Dr. James H. Stith. At all relevant times, Mr. Brodsky was and still is responsible for the management and operation of AIP and is responsible for all other employment related issues at AIP. In addition, Mr. Brodsky is a policymaker charged with the responsibility of ensuring that employees are not subjected to discrimination or harassment. Moreover, Mr. Brodsky is responsible for properly training and supervising employees at AIP.

9. Theresa Braun is AIP's Vice President, Human Resources. She has been employed with AIP for 24 years. She reports directly to Mr. Brodsky. Ms. Braun was and still is an official charged with the responsibility of hiring, promoting and disciplining of employees and with the handling of all other employment related issues. Ms. Braun is also a policymaker responsible for ensuring that employees are not subjected to discrimination or harassment. Additionally, Ms. Braun is responsible for properly training and supervising employees at AIP.

10. Dr. James H. Stith is AIP's Vice President, Physics Resources. He has been employed with AIP for five and one-half years. He reports directly to Mr. Brodsky. Dr. Stith was and still is an official responsible for the management of several departments within AIP, including the *Physics Today* division. Dr. Stith is also charged with the responsibility of hiring, promoting and disciplining employees, and with the handling of all other employment related issues. Dr. Stith is a policymaker charged with the responsibility of ensuring that employees are not subjected to discrimination or harassment. Moreover, Dr. Stith is responsible for properly training and supervising employees at AIP.

11. Randolph A. Nanna is Publisher of *Physics Today*. Mr. Nanna reports to Dr. Stith. AIP hired Mr. Nanna in or around November 15, 1999, to replace Charles Harris, whom AIP fired in or

around March 2, 1999. As Publisher of *Physics Today*, Mr. Nanna was and still is an official responsible for the management of *Physics Today*. Mr. Nanna is also charged with the responsibility of hiring, promoting and disciplining employees, and with the handling of all other employment related issues. Additionally, Mr. Nanna is a policymaker charged with the responsibility of ensuring that employees are not subjected to discrimination or harassment. Mr. Nanna is also responsible for properly training and supervising employees within *Physics Today*.

12. Stephen G. Benka was Dr. Schmidt's direct supervisor from in or around September 1994 until Dr. Schmidt's dismissal. Mr. Benka is the Editor of *Physics Today*. He reports to Mr. Nanna. He formerly reported to Mr. Harris. Mr. Benka was and still is an official responsible for the management of *Physics Today*. In addition, Mr. Benka is charged with the responsibility of hiring, promoting and disciplining employees, and with the handling of all other employment related issues. Mr. Benka is also a policymaker charged with the responsibility of ensuring that employees are not subjected to discrimination or harassment.

V. ALLEGATIONS

13. Dr. Schmidt was employed as an editor by AIP from March 17, 1981, until May 31, 2000. During his employment, Dr. Schmidt became concerned about the increasing lack of racial diversity at AIP at the professional level. Dr. Schmidt repeatedly voiced his concerns to his managers at *Physics Today* and then to higher AIP management. Dr. Schmidt complained in writing of the "*de facto* 'whites only' hiring policy at *Physics Today*." By the time of Dr. Schmidt's dismissal, AIP's employment practices had left *Physics Today* with an all-white professional staff of sixteen editors and writers.

14. Dr. Schmidt consistently pressured AIP's management to live up to its claim that AIP was an equal opportunity employer and to increase the racial diversity among its professional employees. Dr. Schmidt also routinely presented items to AIP management in an effort to improve

working conditions and employee morale at AIP. At times, he enlisted some of his co-workers to join in his efforts. Management viewed Dr. Schmidt's efforts as "nonproductive" and "disruptive."

15. *Physics Today* publisher Charles Harris, in a conversation with Dr. Schmidt, remarked that a single dissident can adversely affect an entire workplace. This conversation took place in 1994, shortly after Mr. Harris began working at *Physics Today*. On or around March 8, 1996, Mr. Harris raised Dr. Schmidt's job performance rating from "Meets Job Requirements" to "Exceeds Job Requirements," following a meeting with Dr. Schmidt. Mr. Harris commented to Dr. Schmidt that his only reservation was that Dr. Schmidt's higher performance rating would add a year to the time it would take to terminate him if AIP ever decided to do so.

16. On October 4, 1996, Dr. Schmidt complained to the *Physics Today* advisory committee about unjustified salary differentials between the only minority professional, Jean A. Kumagai, and the white employees at her level. On or about November 15, 1996, the committee reported the salary inequity problem to AIP management. AIP was forced to award Ms. Kumagai a 25% salary increase. AIP management voiced displeasure with Dr. Schmidt's efforts.

17. On November 15, 1996, Dr. Schmidt led an effort by some staff members to request in writing that AIP change its hiring practices to "increase diversity of *Physics Today* staff."

18. On November 26 and 27, 1996, Dr. Schmidt and coworker Jean Kumagai successfully pressured AIP into sending a job-opening announcement to minority group organizations. Dr. Schmidt and Ms. Kumagai also updated the *Physics Today* staff on the status of equal employment opportunity efforts related to the job opening.

19. *Physics Today* publisher Charles Harris communicated to Dr. Schmidt and other staff members that he was strongly opposed to their activities, which had increased significantly in 1996, and which included criticism of the discriminatory hiring practices at AIP.

20. In April 1997, after AIP had interviewed three white males for an open position, Dr. Schmidt argued strongly at a *Physics Today* staff meeting that the promising minority applicants should

be interviewed as well. *Physics Today* Publisher Charles Harris and Editor Stephen G. Benka denied Dr. Schmidt's request. Approximately one week later, Mr. Benka announced that the magazine had hired one of the white males and that he had phoned six "very promising" applicants, mainly minority group members, but only to tell them that he would consider them for future openings.

21. In late July 1997, Dr. Schmidt began working four days a week from his home office in Washington, D.C.

22. On August 25, 1997, Dr. Schmidt discovered that Mr. Benka had changed Dr. Schmidt's job description without Dr. Schmidt's knowledge and following repeated requests from Dr. Schmidt that Mr. Benka provide him with more articles to edit. Dr. Schmidt's new job description made him responsible for getting some articles for the magazine. With this added responsibility, Dr. Schmidt's article editing quota was decreased from 16 articles per year to 14 articles per year.

23. At a staff retreat in Washington, D.C. on September 25, 1997, *Physics Today* Publisher Charles Harris shouted at Dr. Schmidt to prevent him from asking a question. Mr. Harris ordered Dr. Schmidt to keep quiet and did not allow the staff to ask questions during the entire day. A few days later, Mr. Harris indicated to Dr. Schmidt that he thought Dr. Schmidt's request at the meeting was an attempt to raise workplace issues of concern to Dr. Schmidt, which Mr. Harris knew most prominently included diversity issues.

24. On October 1, 1997, Messrs. Harris and Benka delivered a notice to Dr. Schmidt stating that management would no longer tolerate actions it deemed to be "counterproductive." This notice was the equivalent of a gag order on Dr. Schmidt. AIP clearly intended to curtail Dr. Schmidt's efforts, which had focused most prominently on the issue of equal employment opportunity and the lack of staff diversity.

25. Frustrated by the lack of response to his repeated attempts to address AIP's discriminatory hiring practices, on October 17, 1997, Dr. Schmidt met with the *Physics Today* advisory committee and objected to the magazine's discriminatory employment practices and failure to live up to

its claim that it was an equal opportunity employer. In the following weeks and months, Mr. Harris continuously and harshly criticized Dr. Schmidt for his role in presenting these issues to the *Physics Today* advisory committee.

26. On October 24, 1997, AIP's Executive Director and CEO Marc H. Brodsky accused Dr. Schmidt of leveling an unfounded charge of discrimination regarding *Physics Today's* hiring practices. Mr. Brodsky demanded that Dr. Schmidt prove that AIP's hiring practices were discriminatory.

27. On November 5, 1997, in response to Mr. Brodsky's demand, Dr. Schmidt met with Mr. Brodsky and gave him a memorandum that outlined AIP and *Physics Today's* discriminatory hiring practices. Mr. Brodsky said he would investigate and get back to Dr. Schmidt. The memorandum included the fact that AIP had represented to the federal government, in a report, that AIP would conduct equal employment opportunity and affirmative action training for all AIP employees. Dr. Schmidt noted that AIP had not conducted the promised training. Mr. Brodsky disputed that the training had not been provided, saying that he might have mentioned diversity during his biannual one-hour question and answer session for AIP employees. Dr. Schmidt had attended that session and heard no mention of equal employment opportunity or diversity. In any case, mentioning equal employment opportunity falls far short of serious, constructive training.

28. Following Dr. Schmidt's November 5, 1997, meeting with Mr. Brodsky, Dr. Schmidt sent Mr. Brodsky a memorandum suggesting that Mr. Brodsky speak with the only minority group member of the *Physics Today* staff, Jean Kumagai, about discrimination at the magazine. Mr. Brodsky did not do that. His failure to speak with Ms. Kumagai further demonstrated AIP's lack of interest in fulfilling its equal employment opportunity obligation.

29. On December 2, 1997, AIP sent Dr. Schmidt a memorandum titled "rescindment," rescinding the gag order that it had placed on him. AIP rescinded the gag order after many staff members openly criticized it.

30. On January 19, 1998, Mr. Brodsky informed Dr. Schmidt that he was still looking into the equal employment opportunity issue, as he had promised on November 5, 1997. This was more than two months after Dr. Schmidt had brought the problem to Mr. Brodsky's attention and nearly two years after AIP had agreed to conduct equal opportunity and affirmative action training. AIP had made no progress or taken a single step to address the diversity or hiring practices problem at *Physics Today* despite repeated requests by Dr. Schmidt and despite AIP's representation to the federal government.

31. AIP's retaliatory actions continued. On January 22, 1998, Mr. Harris refused Dr. Schmidt's request for relief from the pressure to take on additional clerical work. Mr. Harris told Dr. Schmidt that his activities in the previous year made him "unsympathetic" to Dr. Schmidt's requests. This is a clear example of retaliation against Dr. Schmidt.

32. On January 28, 1998, after normal working hours, Mr. Benka broke up two private conversations between Dr. Schmidt and coworker Toni Feder. When Dr. Schmidt asked Mr. Benka why he disrupted the conversations, Mr. Benka said that he did not want any activities similar to what had occurred in the previous year. Mr. Benka's behavior and explanation indicated that Dr. Schmidt's supervisors viewed Dr. Schmidt's attempts to raise awareness about the lack of diversity at *Physics Today* in a negative light.

33. Following the disruption of Dr. Schmidt's and Ms. Feder's private conversations, Mr. Benka stated that all private conversations at work would be subject to monitoring by management. The ban on private conversations appeared to be aimed primarily at Dr. Schmidt and was an attempt to prevent him and other employees from criticizing management practices, including its discriminatory hiring practices, or attempting to change them.

34. On March 20, 1998, Dr. Schmidt met with Mr. Brodsky and pressed him to conduct the equal opportunity staff training that AIP had told the government it would conduct. Mr. Brodsky said he would look into it, but AIP still failed to provide the training. At that time, *Physics Today* had an all-white staff of eighteen employees, with one exception, an Asian-American woman. The meeting ended

after Dr. Schmidt reiterated his belief that a serious problem existed in the hiring practices at *Physics Today*. Mr. Brodsky told Dr. Schmidt that some of Dr. Schmidt's activities were "counterproductive."

35. On March 24, 1998, Dr. Schmidt met with Mr. Benka to discuss his 1998 performance review. Mr. Benka focused on Dr. Schmidt's activities, in particular around the 1996 staff retreat, where Dr. Schmidt drew attention to the lack of diversity at *Physics Today* and raised other issues. Mr. Benka focused on the 1996 events in Dr. Schmidt's 1998 performance review despite the fact that they had occurred nearly a year and a half earlier, before the period supposedly covered by the performance review. Mr. Benka called Dr. Schmidt's activities "disruptive" and made it clear that Dr. Schmidt's actions would not be forgotten, no matter how long ago they occurred. AIP lowered Dr. Schmidt's performance rating from "Exceeds Job Requirements" to "Meets Job Requirements" and instituted what it called "new demands" on Dr. Schmidt, including a 28% increase in his workload. Mr. Benka warned Dr. Schmidt that any "disruptive" actions would not be tolerated in the future.

36. On April 27, 1998, Dr. Schmidt appealed his 1998 performance review to AIP's Director of Human Resources, Theresa Braun, and Director of Physics Programs, James H. Stith. Dr. Schmidt noted in his appeal that he received a lower performance rating as punishment for his activities, whose biggest focus was attempting to change AIP's discriminatory hiring practices, and not as a result of the quality or quantity of his work. Also included in Dr. Schmidt's appeal were supporting documents from article authors commending Dr. Schmidt on the quality of his work. Throughout his tenure at *Physics Today*, Dr. Schmidt received praise for his work from prominent physicists and from his supervisors.

37. On or about April 27, 1998, Dr. Schmidt circulated his appeal memorandum to twelve coworkers.

38. On June 25, 1998, Dr. Stith denied Dr. Schmidt's appeal requesting the correction of false statements in his performance review. Dr. Stith cited Dr. Schmidt's activities as the reason for the denial and as the reason for Dr. Schmidt's lowered rating. Dr. Stith told Dr. Schmidt that when he did things

that his supervisors would be happier that he not do, he had to be willing to pay a penalty if it was imposed, even if his actions were right.

39. On June 25, 1998, Dr. Schmidt appealed the ban on private conversations to Dr. Stith. Dr. Stith told Dr. Schmidt that he knew about the ban, which was described in Dr. Schmidt's April 27, 1998, performance review appeal. Dr. Schmidt asked Dr. Stith to retract it. Dr. Stith promised to look into it, but he never lifted the ban. This amounted to executive-level ratification and approval of the ban, which was a retaliatory measure aimed mainly at Dr. Schmidt.

40. From mid-December 1998 to mid-June 1999, Dr. Schmidt took a six-month unpaid leave of absence. Dr. Schmidt used this time to work on a book.

41. When Dr. Schmidt returned to work in mid-June 1999, Mr. Benka criticized him harshly for showing coworkers his 1998 performance review appeal 14 months earlier. It was common for *Physics Today* staff members to discuss their performance reviews with their coworkers. Mr. Benka told Dr. Schmidt that he was lucky to still be employed after showing his coworkers the appeal. The biggest section of the appeal focused on the issue of discrimination in employment practices at *Physics Today*.

42. On June 29, 1999, Dr. Schmidt requested authorization to work on a 2/3-time basis. This request was granted on August 9, 1999.

43. AIP continued to retaliate against Dr. Schmidt with inaccurate, unfair and punitive performance evaluations. In 1997, Dr. Schmidt received a rating of "Exceeds Job Requirements," but the following year he received the lower rating of "Meets Job Requirements." Dr. Schmidt received the lower rating even though there had been no reduction in the quality or quantity of his work. In fact, he had done more work than the previous year. Dr. Schmidt received the lower rating after persistently bringing his concerns about AIP's diversity problem to the attention of AIP management and after being told repeatedly that such actions were disruptive.

44. In 1999, AIP again gave Dr. Schmidt a performance rating lower than "Exceeds Job Requirements." The 1999 review criticized Dr. Schmidt for something he did 16 months earlier:

circulate to the staff his 1998 performance review appeal, which documented Dr. Schmidt's belief that AIP's hiring practices were discriminatory. It was precisely the document's focus on such issues that bothered Mr. Benka, who told Dr. Schmidt on August 19, 1999, "What was extremely destructive was how much of it had *nothing* to do with the review." AIP criticized Dr. Schmidt for circulating that document and said in his 1999 performance review that such action undermined the magazine's "editorial effort" and was "unacceptable." Additionally, the review changed the work accounting method previously employed by AIP and inaccurately claimed that Dr. Schmidt had failed to meet work quantity standards set by AIP.

45. Dr. Schmidt subsequently met with Mr. Benka to discuss his 1999 performance review. Mr. Benka refused to make any changes and told Dr. Schmidt to "contribute productively, constructively and positively to the mission of the magazine."

46. On September 20, 1999, Dr. Schmidt, with the approval of AIP management, began working 2/3-time with full benefits.

47. On or about November 24, 1999, Jean Kumagai, the only minority group member on *Physics Today's* professional staff, left the organization, in part, because of AIP's discriminatory practices. Her resignation left *Physics Today* with an all-white professional staff.

48. On or around November 9, 1999, Dr. Schmidt requested permission to either use his accumulated vacation time or carry it over to the year 2000. AIP management failed to respond to Dr. Schmidt's request until a month later, which did not leave him enough time to use the vacation hours. This forced Dr. Schmidt to forfeit vacation time that he had earned. AIP's actions were retaliatory against Dr. Schmidt, as evidenced by the fact that Dr. Schmidt's coworker Paul Elliott, who suffered the same lack of response to his vacation carry-over request, was permitted to carry over all of his unused vacation time. The difference between the two employees was Dr. Schmidt's outspoken questioning of AIP's practices, particularly its discriminatory employment practices. Top AIP management instructed Mr. Elliott not to tell any of his coworkers of his treatment.

49. On April 5, 2000, Dr. Schmidt met with Mr. Benka and Mr. Nanna to discuss the vacation carry-over problem. Mr. Nanna admitted that AIP had made a mistake, but he refused to take corrective action for Dr. Schmidt. At that meeting, Mr. Benka praised Dr. Schmidt's work for the magazine.

50. Upon information and belief: On, May 22, 2000, Mr. Benka learned that Dr. Schmidt had written a book, titled *Disciplined Minds*, when Mr. Benka noticed a *Physics Today* staff member reading an article about the book in the "Hot Type" column of the May 26, 2000, issue of the *Chronicle of Higher Education*.

51. On May 30, 2000, Dr. Schmidt learned that management was going to act against him and cite his book as the reason. As Dr. Schmidt was leaving for the day, Mr. Benka stopped him to ensure that he was not taking any work files. That was the first time Mr. Benka had ever done that.

52. By May 31, 2000, Dr. Schmidt had completed his entire annual review period work quota in the first ten months of the period.

53. On May 31, 2000, *Physics Today* fired Dr. Schmidt, supposedly for writing some of *Disciplined Minds* at the office. AIP cited the book's opening line about "stolen time" as the reason for the termination. The quoted passage relied on by AIP is literary hyperbole and a literary nod to the book titled *Steal This Book*.

54. The fact that Dr. Schmidt had completed his annual work quota at the time that he was fired dispels any claim by AIP that Dr. Schmidt "stole time" from AIP or worked on his book instead of completing his assignments. Dr. Schmidt's workload quota with AIP mandated that he complete a set amount of work during the year. By May 31, 2000, Dr. Schmidt had not only met his work quota, but had done so two full months ahead of schedule. Thus, AIP's contention that Dr. Schmidt failed to meet his requirements and that he "stole time" are mere pretexts for AIP's real retaliatory reasons for terminating Dr. Schmidt's employment. AIP saw an opportunity to rid itself of Dr. Schmidt and the difficult issues he raised, such as AIP's discriminatory employment practices.

55. By letter dated April 19, 2001, Dr. Schmidt requested that the President of the University of Maryland reinstate his university privileges in light of the circumstances of his firing.

56. On April 8, 2004, the Executive Committee of the University of Maryland Senate decided not to refer the matter to the Campus Affairs Committee for review and did not reinstate Dr. Schmidt's university privileges.

COUNT I

(Breach of Contract)

57. Dr. Schmidt realleges the foregoing paragraphs 1 through 56 as if stated in full herein.

58. AIP's conduct, as described in the foregoing paragraphs, constitutes a breach of the terms of its stated policy with its employees and with the terms of Dr. Schmidt's employment.

59. In response to employees' demand for greater job security, and to address employees' fears that they might be penalized for expressing concerns about the workplace and AIP policies, AIP promised employees that job security would be based on job performance and that speaking freely about workplace concerns would not jeopardize one's job. AIP repeatedly expressed this policy orally and in writing.

60. After receiving that promise, and in consideration for AIP's job security policy, Dr. Schmidt continued to work for the company.

61. AIP's promise regarding employee evaluation and employee freedom of expression became a term of Dr. Schmidt's employment with AIP.

62. Throughout his 19-year career at AIP, Dr. Schmidt consistently received performance ratings of "Meets Job Requirements" or "Exceeds Job Requirements."

63. On May 31, 2000, AIP fired Dr. Schmidt for reasons other than his job performance, thereby materially breaching its contract with Dr. Schmidt.

64. As a direct and foreseeable result of AIP's breach of its job security policy and terms of Dr. Schmidt's employment, Dr. Schmidt suffered substantial damages.

COUNT II

(Detrimental Reliance)

65. Dr. Schmidt realleges the foregoing paragraphs 1 through 64 as if stated in full herein.

66. In response to employees' demand for greater job security, AIP promised employees that job security would be based on job performance and that speaking freely about workplace concerns would not jeopardize one's job.

67. Reasonably relying on this promise, Dr. Schmidt continued to work for AIP and freely expressed his concerns regarding the workplace.

68. As a result of Dr. Schmidt freely expressing his views and for reasons other than his job performance, AIP terminated his employment on May 31, 2000.

69. Consequently, Dr. Schmidt suffered and continues to suffer harm, including but not limited to economic loss, humiliation, embarrassment, emotional distress and mental anguish.

COUNT III

(Breach of Implied Covenant of Good Faith and Fair Dealing)

70. Dr. Schmidt realleges the foregoing paragraphs 1 through 69 as if stated in full herein.

71. AIP had an obligation to act in good faith and deal fairly with Dr. Schmidt.

72. AIP violated that duty and acted in bad faith by terminating Dr. Schmidt's employment for reasons outside of his job performance.

73. As a direct result of AIP's breach of its implied duty to act in good faith and to deal fairly, Dr. Schmidt suffered and continues to suffer harm including but not limited to economic loss, humiliation, embarrassment, emotional distress and mental anguish.

COUNT IV

(42 U.S.C. § 1981)

74. Dr. Schmidt realleges the foregoing paragraphs 1 through 73 as if stated in full herein.

75. The conduct engaged in by the defendants, as set forth herein, constitutes retaliation against Dr. Schmidt for protesting AIP's discriminatory practices that denied minority group members the right to make and enforce contracts and enjoy the full and equal benefit of all laws and proceedings for the security of persons as enjoyed by white citizens, in violation of 42 U.S.C. § 1981.

76. In the actions described above, AIP acted intentionally, maliciously, and with willful, malicious, wanton and reckless disregard for Dr. Schmidt's federally protected rights.

77. As a result of the acts of AIP described above, Dr. Schmidt suffered, and continues to suffer harm, including but not limited to economic loss, humiliation, embarrassment, emotional distress and mental anguish.

COUNT V

(42 U.S.C. § 1983)

78. Dr. Schmidt realleges the foregoing paragraphs 1 through 77 as if stated in full herein.

79. AIP and the University of Maryland are parties to an agreement under which AIP is an affiliate of the University of Maryland, a public institution, and the two entities collaborate and work jointly on projects. AIP employees receive faculty-level university privileges, including access to university facilities and university photo identification cards. Under the affiliation agreement, AIP physicists may be offered adjunct or visiting faculty status.

80. The university delegated to AIP the power to grant access to its state libraries, state computers, and other state facilities without review by the university, and to revoke such access without review by the university. Thus, AIP operated as a state actor in revoking Dr. Schmidt's state university privileges.

81. AIP violated Dr. Schmidt's First Amendment right of free expression when it terminated his employment and revoked his state university library privileges, state university computer account and access to other state university facilities for questioning practices in the workplace. AIP violated Dr. Schmidt's procedural due process rights when it summarily terminated his employment in breach of his employment contract.

82. The terms of the affiliation agreement entwine AIP and the University of Maryland. Thus, AIP operated as a state actor in firing Dr. Schmidt and violated his First Amendment and procedural due process rights when it terminated his employment.

83. AIP officials intentionally committed, condoned or were deliberately indifferent to the aforementioned violations of Dr. Schmidt's constitutional rights. Such deliberate indifference may be inferred in the following ways:

- a. Defendants had a custom or practice of harassing or retaliating against plaintiff for his questioning of discriminatory practices within the workplace and exercising his protected rights under the First Amendment. The discriminatory and retaliatory practices were so persistent and widespread that they constitute the constructive acquiescence of policymakers.
- b. Supervisors failed to properly investigate and address allegations of discrimination, retaliation or harassment.
- c. Inadequate training or supervision was so likely to result in the discrimination, retaliation or harassment that policymakers can reasonably be said to have been deliberately indifferent to the need to provide better training or supervision.
- d. Policymakers engaged in or tacitly condoned the discrimination, retaliation or harassment.

84. The University of Maryland acquiesced and participated in and sanctioned the violation of Dr. Schmidt's protected First Amendment rights when it refused to review the actions of its affiliate, AIP, and did not reinstate Dr. Schmidt's university privileges.

85. As a result of AIP's violation of 42 U.S.C. § 1983, Dr. Schmidt suffered and continues to suffer harm, including but not limited to economic loss, humiliation, embarrassment, emotional distress and mental anguish.

COUNT VI

(42 U.S.C. § 2000e et seq.)

86. Dr. Schmidt realleges the foregoing paragraphs 1 through 85 as if stated in full herein.

87. The unlawful retaliatory conduct engaged in by AIP and its employees, agents and/or representatives as set forth herein violated the rights of Dr. Schmidt under Title VII.

88. As a result of the unlawful retaliatory acts described herein, Dr. Schmidt suffered and continues to suffer harm, including but not limited to economic loss, humiliation, embarrassment, emotional distress and mental anguish.

VI. PRAYER FOR RELIEF


1. WHEREFORE, plaintiff respectfully requests this Court to grant him a judgment for his actual damages for the economic loss, humiliation, embarrassment, emotional distress and mental anguish caused by AIP's violations of the law alleged herein, together with punitive damages, pre- and post-judgment interest as provided by law, attorney's fees, costs and such other or further relief to which plaintiff shows himself justly entitled;

2. Dr. Schmidt further prays that this Court order AIP to reinstate him.

VII. DEMAND FOR A JURY TRIAL

3. Dr. Schmidt demands a trial by jury on all issues so triable as of right.

Respectfully submitted,



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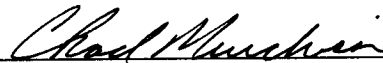
Dated: December 10, 2004

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR LEAVE TO FILE FIRST AMENDED AND CONSOLIDATED COMPLAINT, STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED AND CONSOLIDATED COMPLAINT and PLAINTIFF'S FIRST AMENDED AND CONSOLIDATED COMPLAINT was served by regular United States mail, postage prepaid, this 10th day of December, 2004, upon the following:

Teresa Burke Wright
Jackson Lewis LLP
8614 Westwood Center Drive, Suite 950
Vienna, VA 22182

A handwritten signature in cursive script, reading "Chad Murchison", is positioned above a horizontal line.

Chad Murchison